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No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

vs.

STEPHEN R. MATTATALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A DEFENDANT'S NON-CUSTODIAL, VOLUNTARY, UNSOLICITED, AND UNCOUNSELLED STATEMENT TO A PRIVATE CITIZEN WHO WAS NOT A GOVERNMENT AGENT MUST BE SUPPRESSED AS VIOLATIVE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL, IN A SITUATION WHERE THE POLICE PLAYED AN ENTIRELY PASSIVE ROLE AND MERELY OVERHEARD THE DEFENDANT'S STATEMENT AS A RESULT OF HAPPENSTANCE?

II. WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE MAY BE INVOKED TO SUPPRESS A DEFENDANT'S INCRIMINATORY STATEMENTS WHERE NO COURT HAS EVER MADE A DETERMINATION THAT THE DEFENDANT'S DETENTION WAS VIOLATIVE OF THE FOURTH AMENDMENT?

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Now comes the State of Rhode Island and Providence Plantations, (hereinafter referred to as the State) by its attorney, and prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review said court's erroneous decision of two federal constitutional questions.

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OPINION OF THE COURT BELOW

The case at bar was decided by the Rhode Island Supreme Court in a decision reported as *State v. Stephen R. Mattatall,* 510 A.2d 947 (R.I. 1986). The opinion is reprinted in full at appendix pages 1 through 12.

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STATEMENT OF JURISDICTION

The judgment of the Rhode Island Supreme Court entered on June 9, 1986. A petition to reargue was timely filed on June 13, 1986, and denied by the court in an order dated June 26, 1986. The petition to reargue and accompanying memorandum are set out in full at appendix pages 13 to 24. The order denying reargument is set out at appendix page 25.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3), and by the Rules of the Supreme Court of the United States, R. 17.1(b)(c).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following statutory and constitutional provisions involved in this case are set out beginning at appendix page 26:

U.S. Const. Amend. IV

U.S. Const. Amend. VI

U.S. Const. Amend. XVI, § 1

R.I. Gen. L. 11-1-1

R.I. Gen. L. 11-47-5

STATEMENT OF THE CASE

This case involves the murder of John Scanlon on September 24, 1982, in the City of Warwick, Rhode Island. A Kent County Superior Court jury convicted the Respondent, Stephen R. Mattatall (hereinafter referred to as "defendant") of second degree murder. The trial judge sentenced defendant to forty years' imprisonment of which ten years was suspended. An additional ten years was imposed pursuant to the habitual offender statute. The Rhode Island Supreme Court reversed defendant's conviction on two grounds. *State v. Mattatall*, 510 A.2d 947 (R.I. 1986). The court concluded that the trial judge had erred in denying two separate suppression motions filed by the defendant. The state court's opinion is set out beginning at page 1 of the appendix hereto.

Factual Background. On the evening of September 23, 1982, John Scanlon received a telephone call from de-

fendant. As a result of this call, Scanlon went to defendant's house to meet with the defendant. The next morning, defendant's wife found Scanlon shot to death on the defendant's kitchen floor. As a result of a call to the police from defendant's neighbor, Warwick police responded to the scene of the killing. A .22 calibre weapon was found on the floor next to the victim. Subsequent balistic tests, however, revealed that the fatal bullet was not from the .22, but from a .357 that had been purchased earlier in the year by the defendant's sister.

Statements to Police. After the police arrived at defendant's home, the defendant emerged from an upstairs bedroom. He looked at the victim's body and stated that he should not have shown the victim the gun the night before. According to the police testimony, defendant was in an agitated state. Believing the defendant to be a significant witness with regard to the shooting, the Warwick police transported him to headquarters for the purpose of questioning. The police did not consider the defendant to be under arrest at this point. Although defendant never gave a written statement, he made several oral statements to the Warwick police. During the course of his stay at headquarters, defendant first suggested that Scanlon had committed suicide with the .22 weapon. When confronted with a question regarding the .357 as opposed to the .22, defendant changed his version and described the killing as an accident. These oral statements became the subject matter of a motion to suppress. Defendant argued that the statements were the fruits of an unlawful arrest and were therefore violative of this Court's decision in *Dunaway v. New York*, 442 U.S. 200 (1979). Finding that the defendant was not under arrest at the time that

he made these statements, the trial judge therefore denied the defendant's motion to suppress without addressing the issue of probable cause.

Statements to Private Individual. In addition to the statements made to the police officers, defendant also made statements to an acquaintance named John Carney. On December 26 and 27, 1982, the defendant telephoned Carney and spoke with him regarding the death of John Scanlon. Carney had previously received threatening phone calls from the defendant, and at the time of the December 26 and 27 calls, members of the Warwick Police Department were at Carney's home investigating these threats. During the course of these calls, defendant made statements indicating that Scanlon's death was not suicide and that the defendant and Scanlon had been alone at the time of the shooting. At Carney's request, because Carney anticipated that the calls might involve further threats, the Warwick police officers listened on an extension phone. There was no evidence that Carney was a police agent or informant. On all occasions, the calls were initiated by the defendant. Carney testified that no one had instructed him to discuss the Scanlon shooting. Finding that on each occasion it was the defendant, not Carney, who initiated the calls and brought up the subject of Scanlon's death, the trial judge rejected defendant's Sixth Amendment motion to suppress the uncounselled statements to Carney.

Opinion of the Rhode Island Supreme Court. Based upon the physical evidence and his contradictory statements, the defendant was convicted of second degree murder. On appeal, the Rhode Island Supreme Court held that the trial judge had erred in denying defendant's motions

to suppress. With regard to the Sixth Amendment issue, the court found a rule of *per se* exclusion in this Court's decision in *Maine v. Moulton,* 106 S. Ct. 477 (1985). Because the statements to Carney were made in the absence of counsel, the Rhode Island court deemed them inadmissible *per se,* without any analysis of the nature of the police conduct. The State submits that this holding is clearly contrary to this Court's decision *Moulton* and the more recent decision in *Kuhlman v. Wilson,* 91 L. Ed. 2d 364 (1986). Accordingly, a writ of certiorari should issue to correct this error.

With regard to the Fourth Amendment issue, the state court found that the trial justice had erred in concluding that defendant was not under arrest at the time the statements were made. Having found an arrest, however, the court "assumed without deciding" that the police lacked probable cause for the arrest. The court based this assumption on the tautological theory that the police did not believe that defendant was under arrest and that they therefore must have lacked probable cause. Thus, without any court having determined that the defendant's arrest was unlawful, the Rhode Island Supreme Court invoked the Fourth Amendment exclusionary rule to suppress defendant's statements. The State submits that, having found defendant to be under arrest, the Rhode Island Supreme Court was required to undertake a probable cause analysis to determine whether that arrest was lawful. The lack of such an analysis renders the court's application of the exclusionary rule erroneous. This court should grant certiorari in order to address the question whether a court may invoke the exclusionary rule without ever having addressed the legality of a defendant's detention.

ARGUMENT

I. THE RHODE ISLAND SUPREME COURT ERRONEOUSLY APPLIED THE SIXTH AMENDMENT EXCLUSIONARY RULE TO VOLUNTARY, UNSOLICITED STATEMENTS OF THE DEFENDANT MADE TO AN ACQUAINTANCE.

On December 26 and 27, 1982, the defendant telephoned a friend, John Carney, and spoke with him regarding the death of John Scanlon. Carney had previously received threatening phone calls from the defendant, and at the time of the December 26 and 27 calls, members of the Warwick Police Department were at Carney's home investigating these threats. During the course of these calls, defendant made certain statements of an incriminating nature. There was no evidence that Carney was a police agent or informant. Carney testified that no one has instructed him to discuss the Scanlon shooting. Indeed, the trial judge specifically found that on each occasion it was the defendant, not Carney, who brought up the subject of Scanlon's death. In particular, at the close of the pre-trial suppression hearing, the court made the following factual finding:

> [THE COURT:] Mr. Carney testified, it was uncontradicted, that he had called the police to his home for protection. That's what the police were there for because of the threats Mr. Carney had allegedly received. While they were there, the phone rang. Mr. Carney answered and asked the police officer to listen in.
>
> This defendant has no right of privacy on a telephone call when he makes it outside. This telephone call was made to Mr. Carney. It was not made by Mr. Carney. There is no evidence on the record that

there is any suggestion by the police as to what Mr. Carney should say, or how he should direct the conversation, or that he should raise the issue of the Scanlon shooting. There was nothing at all. *The police role was entirely passive.* They listened. They gave no instruction.

Mr. Carney stated clearly he was not acting for the police. He had the police in his house for purposes of protection. They were not there to listen in on his telephone calls, but because of the threats he had received, he wanted the police to listen to see who was on the phone and what was being said, and *it was this defendant who brought up the Scanlon issue.* It wasn't Mr. Carney.

Tr. at 277-78. Based upon the foregoing factual findings, the trial judge denied the defendant's various motions to suppress the statements made to Carney.

Despite the clear findings that "the police role was entirely passive," the Rhode Island Supreme Court found error in the admission of the defendant's statements to Carney. The court concluded that suppression was mandated by this Court's resent decision in *Maine v. Moulton*, 106 S. Ct. 477 (1985). The Rhode Island court apparently interpreted *Moulton* to require exclusion of *any* uncounselled statements overheard by the police, regardless of the nature of police involvement or the factual circumstances surrounding the statement. Once the right to counsel had attached, the court reasoned, a defendant's overheard uncounselled statements are totally unavailable for use at trial:

There is no question that the Sixth Amendment right to counsel was applicable in this case, that counsel had entered an appearance in the case, that the police knew or were chargeable with knowledge of this set

> of facts, and that they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. However justifiable it may have been for the police to take this action for the purpose of investigating other criminal conduct, *the plain message of Moulton is that the prosecution may not use evidence obtained regarding the pending charges against the defendant at his trial.* Whether the police use a telephone, an electronic device, or a jailmate to obtain this information is not controlling. The doctrine established by the Supreme Court of the United States requires that such information not be used in evidence against the defendant on the charge in respect to which the right to counsel has previously attached.

App. at 11-12, 510 A.2d at 953.

The State respectfully suggests that the Rhode Island Supreme Court has erred in its interpretation of the holding of *Moulton.* First, the Court in *Moulton* specifically stated that "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." 106 S. Ct. at 487. In a footnote, this Court suggested that in order to prevail on a suppression motion, the defendant must demonstrate that "the State 'must have known' that *its agent* was likely to obtain incriminating statements from the accused . . ." *Id.* n. 12 (emphasis added). Thus, *Moulton* strongly implies that suppression will be unavailable when the defendant is conversing with someone other than a police agent.

Moreover, this Court's recent decision in *Kuhlman v. Wilson,* 91 L. Ed. 2d 364 (1986), clearly demonstrates that the Rhode Island Supreme Court has erred in its application of the Sixth Amendment. In *Wilson,* the de-

fendant, who was under arrest for robbery and murder, was deliberately placed in a prison cell with a police informant. Defendant had initially told the police that he was present at the scene of the crime, but he denied that he knew the perpetrators or that he had participated in the crime. The prison cell informant agreed to report any incriminating admissions to the police. The police specifically instructed the informant not to ask defendant any questions, but simply "to keep his ears open." *Id.* at 372. Defendant initially told the informant the same story he had told the police. In response to this story, the informant told defendant that he had "better come up with a better story than that because that one doesn't sound too cool . . . " *Id.* n.1. Thereafter, defendant gradually changed his version to an admission that he had planned and participated in the robbery and murder. Based upon this set of facts, the United States Court of Appeals for the Second Circuit held that the defendant's statements had been obtained in violation of his Sixth Amendment right to counsel. *Id.* at 374 (citing *Wilson v. Henderson,* 742 F.2d 741 (2d Cir. 1984)). This court granted certiorari and reversed. The Court reasoned that the defendant's statements to the informant had been "spontaneous" and "unsolicited." *Id.* at 385:

> [A] defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 384-85. Because the defendant in *Wilson* had failed to make this showing, this Court held that suppression of the incriminating statements was inappropriate.

Measured against the law as applied in *Moulton* and *Wilson,* the Rhode Island Supreme Court clearly committed error in the instant case. In this case, the Warwick police played no role whatsoever in the exchange of communication between Carney and the defendant. Carney was neither a police agent nor paid informant, but an individual private citizen who considered himself in some danger. The calls themselves were initiated by defendant, and it was he, not Carney, who brought up the topic of the Scanlon shooting. Carney's conduct can scarcely be considered interrogation. Moreover, the presence of the police was happenstance and was justified by independent need to investigate the threats to Carney. The trial judge specifically found the role of the officers to have been a "passive" one.

In sum, under the law enunciated in *Moulton* and *Wilson,* the Rhode Island Supreme Court erred in finding a Sixth Amendment violation. This Court should grant a writ of certiorari in order to correct that error.

II. IN A CASE WHERE NO COURT HAD EVER DETERMINED THAT DEFENDANT'S ARREST WAS UNLAWFUL, THE RHODE ISLAND SUPREME COURT ERRED BY INVOKING THE FOURTH AMENDMENT EXCLUSIONARY RULE TO SUPPRESS A DEFENDANT'S VOLUNTARY STATEMENT.

A. *Introduction.* This case presents a significant question with regard to the administration of the Fourth Amendment exclusionary rule. The issue presented is

whether the Fourth Amendment exclusionary rule may be invoked to suppress a defendant's incriminatory statements where no court has ever made a threshold determination that the defendant's detention was unlawful. At the pre-trial suppression hearing in Kent County Superior Court the trial judge never addressed the issue of probable cause, concluding instead that the defendant was not under arrest at the time of the interrogation. The Rhode Island Supreme Court reversed. Reasoning that a so-called investigory detention amounted to a seizure for Fourth Amendment purposes, the court reversed based upon this Court's decision in *Dunaway v. New York,* 442 U.S. 200 (1979). In reaching this conclusion, however, the Rhode Island court "assumed without deciding" that the police lacked probable cause to arrest the defendant. App. at 4, 510 A.2d at 950. The State submits that such an assumption is neither consistent with the cases decided by this Court nor with the purposes and goals of the Fourth Amendment exclusionary rule. The rule provides for the suppression of a defendant's otherwise voluntary statement when three specific criteria are met. First, the defendant must have been "seized" as that term is defined for Fourth Amendment purposes. Second, the seizure must be violative of the Fourth Amendment's proscription against unreasonable searches and seizures. And finally, the statement itself must be a "fruit" of the seizure.

The State respectfully suggests that this three step analysis is a necessary prerequisite to Fourth Amendment exclusion. In the instant case, however, the Rhode Island Supreme Court applied the exclusionary rule without addressing the second—and pivotal—point of the analysis. The court never analyzed to determine whether

the police had probable cause at the time that defendant was seized. This fatal flaw renders the Rhode Island court's reasoning erroneous and warrants exercise of this Court's certiorari jurisdiction.

B. *The Fourth Amendment Exclusionary Rule.* In *Weeks v. United States*, 232 U.S. 383 (1914), this Court held that evidence obtained in violation of a defendant's Fourth Amendment rights may not be used as evidence against the defendant in a federal[1] criminal prosecution. *Id.* at 393-94. Nearly three-quarters of a century has passed since the Court's first announcement of the *Weeks* exclusionary rule. In that time this Court has refined the application of the rule in many regards. The *Weeks* rule—which appeared originally only to exclude the particular pieces of improperly seized evidence—was quickly explained by Justice Holmes to require suppression of follow-up evidence gained by exploitation of the initial illegality:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the government's own wrong cannot be used by it in the way proposed.

Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). After *Silverthorne*, in the words of Justice

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[1] In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court held that the *Weeks* exclusionary rule applies with equal force in state criminal proceedings. *Id.* at 654-55.

Frankfurter, the *Weeks* exclusionary rule prohibited the government from introducing not only the illegally seized evidence itself, but also any evidence that was "a fruit of the poisonous tree." *Nardone v. United States,* 308 U.S. 338, 341 (1939). The Court further refined the "fruit of the poisonous tree" analysis in *Wong Sun v. United States,* 371 U.S. 471 (1963). In *Wong Sun* the Court clearly stated that the exclusionary rule will not preclude the fruits of illegal conduct in situations where intervening events have "purged the taint" of initially unlawful conduct:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 488 (citation omitted); *see id.* at 491-92 (although defendant's arrest was illegal, defendant's statement should not be excluded because intervening events served to attenuate the taint of the initial illegality).

C. *Limitations on the Exclusionary Rule.* Without wavering from the efficacy of the Fourth Amendment exclusionary rule, this Court has on occasion recognized that the philosophical underpinnings of the rule will not always support the rule's application in certain circumstances. For example, in *Walder v. United States,* 347 U.S. 62 (1954), the Court held that the exclusionary rule does not preclude a prosecutor from using illegally seized evidence for the limited purpose of impeaching the credi-

bility of a defendant who testifies in his own defense. *Id.* at 65 ("there is hardly a justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility."). Similarly, in *United States v. Calandra*, 414 U.S. 338 (1974), the Court held that the Fourth Amendment exclusionary rule does not preclude the use of unlawfully obtained evidence in grand jury proceedings. *Id.* at 351-52. In reaching this conclusion, the Court reasoned that the purpose of the rule—deterring police misconduct—would not justify suppression at the grand jury stage of criminal proceedings. *See id.* at 351 ("Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best."). This Court described a further limitation on the application of the rule in *Stone v. Powell*, 428 U.S. 465 (1976). *Powell* involved the availability of the Fourth Amendment exclusionary rule as a basis for a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. This Court held that the exclusionary rule should not be available to a habeas petitioner seeking collateral review of state court convictions, so long as the state court system provided the petitioner with an opportunity to assert his Fourth Amendment claim. In reaching this conclusion, the Court undertook a risk-utility analysis:

> Application of the [exclusionary] rule . . . deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in

> part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Id. at 490-94 (footnotes omitted). More recently, the Court has recognized a "good faith exception" to the exclusionary rule that applies to permit the use of illegally seized evidence in situations where the police relied in good faith upon a warrant. *United States v. Leon,* 104 S. Ct. 3404 (1984). In finding a good faith exception, the Court in *Leon* again balanced the utility of the exclusionary rule against the heavy societal costs attendant to the rule's application:

> The substantial societal costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury." . . . An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system . . . Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and the administration of justice."

Id. at 3413 (footnotes and citations omitted).

This Court has clearly expressed concern for the proper administration of the Fourth Amendment exclu-

sionary rule. Despite the Court's consistent adherence to the principles of deterrence embodied in the rule, the Court has specifically declined to permit the rule to be used in a manner that perverts the ends of justice. The Court's decisions in *Leon, Powell, Calandra,* and *Walder* all demonstrate this Court's concern that the rule be applied in a logical and reasonable manner in order to avoid an indiscriminate application and to assure "the idea of proportionality that is essential to the concept of justice." *Powell, supra.*

D. *The Rhode Island Supreme Court erroneously excluded the defendant's statement under the Fourth Amendment exclusionary rule.* This Court has applied the exclusionary rule in several cases to suppress a voluntary statement that was obtained in violation of a defendant's Fourth Amendment rights. In *Brown v. Illinois,* 422 U.S. 590 (1975), this Court held that the Fourth Amendment exclusionary rule may operate to bar the admissibility of a defendant's statement even when the statement is voluntary and the interrogating officers have fully complied with the rule of *Miranda. Id.* at 603-04. In *Brown,* police officers who were investigating a homicide undertook to "interview" all of the victim's acquaintances, including defendant Brown. *Id.* at 592. Without a warrant or probable cause, police officers broke into Brown's apartment, conducted a thorough search, and arrested defendant Brown. *Id.* During a subsequent interrogation, Brown voluntarily waived his *Miranda* rights and admitted his involvement in the homicide. *Id.* at 594-95. This Court, although recognizing that an individual who is under illegal arrest may nevertheless consent to interrogation, *id.* at 603, rejected the contention that proper *Miranda* warnings alone are sufficiently purgative of the threshold illegal-

ity to dissipate the taint of the original police misconduct. Instead, the Court in *Brown* concluded that a proper analysis focuses upon several factors:

> The question whether a confession is the product of free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. . . . The voluntariness of the statement is a threshold requirement.

Id. at 603-04 (citations and footnotes omitted). The Court concluded on the facts of *Brown* that there were no "intervening events of significance," *id.* at 604, between the time of the illegal arrest and interrogation. Thus, the *Brown* Court found nothing of a purgative nature that would render the statement admissible.

The Court in *Dunaway v. New York*, 442 U.S. 200 (1979), held that the rule of *Brown* applies with equal force in cases where police take an individual into custody for "investigative" purposes. Thus, even in situations where a suspect is not under formal arrest, his statement may be suppressed if the police lacked probable cause at the time of the detention. *Id.* at 211-14. In reaching this result, the Court in *Dunaway* described probable cause as

"the threshold standard . . . for Fourth Amendment seizures . . . " *Id.* at 213. More recently, however, in *Florida v. Rodriguez,* 105 S. Ct. 308 (1984), the Court reiterated the view that in certain limited circumstances, an individual may be detained without probable cause for investigatory questioning:

> Certain constraints on personal liberty that constitute "seizures" for purposes of the Fourth Amendment may nonetheless be justified even though there is no showing of "probable cause" if "there is articulable suspicion that a person has committed or is about to commit a crime." . . . Such a temporary detention for questioning in the case of an airport search is reviewed under the lesser standard enunciated in *Terry v. Ohio,* . . . and is permissible because of the "public interest involved in the suppression of illegal transactions in drugs or of any other serious crime."

Florida v. Rodriguez, 105 S. Ct. at 310 (citations omitted).

The foregoing cases demonstrate that three fundamental questions that must be answered in determining whether the Fourth Amendment exclusionary rule will operate to suppress the admissibility of a defendant's statement. First, the defendant must be under arrest as that term is defined for Fourth Amendment purposes. *Dunaway* and *Rodriguez,* both *supra.* Second, the arrest or custody must be unreasonable. That is, at the time of the initial detention, the police must lack probable cause for the defendant's arrest. *Dunaway v. New York,* 442 U.S. at 213 (probable cause is "threshold standard" for determining reasonableness of fourth amendment seizure). Finally, the defendant's statement must be a "fruit" of the unlawful arrest, under the test enunciated in *Wong Sun* and *Brown.*

Of these three essential prerequisites for application of the exclusionary rule, the State submits that second is the most significant. *Weeks* and its progeny flow from the Fourth Amendment. A detention that does not violate the Fourth Amendment simply cannot form the basis for operation of the *Weeks* exclusionary rule. Indeed, in *Brown* itself, the Court specifically described "the purpose and flagrancy of the official misconduct," as an essential consideration in determining whether the defendant's statement was a product of the impermissible detention. 422 U.S. at 603. Thus, the exclusionary rule will be of no force whatsoever if the police acted within the bounds of Fourth Amendment reasonableness in arresting the defendant. If the police acted upon probable cause, the exclusionary rule need not apply because "there is no police illegality and thus nothing to deter." *United States v. Leon*, 104 S. Ct. at 3420. A court that applies the rule must therefore be duly sensitive in analyzing the reasonableness of the detention. To do otherwise would constitute an "indiscriminate" application of the exclusionary rule and would run the risk of "generating disrespect for the law and the administration of justice." *Stone v. Powell, supra.*

In the instant case the trial court found that the defendant was not in custody for Fourth Amendment purposes. The trial judge therefore never addressed the issue of probable cause. The Rhode Island Supreme Court, after concluding that the trial judge had erred in his decision regarding custody, nevertheless declined to address the pivotal issue of probable cause. Instead, the court "assumed without deciding" that the police lacked prob-

able cause at the time of defendant's arrest. App. at 4, 510 A.2d at 950. The apparent basis for this fundamental gap in the court's application of the exclusionary rule was the tautological conclusion that the police did not believe that they were arresting the defendant and that, therefore, they must not have had probable cause to arrest. Thus, rather than undertaking the task of determining whether the defendant's arrest was supported by probable cause, the Rhode Island Supreme Court chose instead to base its holding on the subjective belief of the officers who testified at the suppression hearing.

This logic, turning as it does on the subjective belief of the police officer, is fatally flawed for obvious reasons. This Court has held on numerous occasions that the existence of probable cause is an objective question. *E.g. Draper v. United States*, 358 U.S. 307, 313 (1951) (promulgating "reasonable man" standard for probable cause); *Brown v. Texas*, 443 U.S. 47, 51-53 (1979) (reasonableness of detention must rest on objective criteria). To hold otherwise would assign the critical notion of probable cause to the subjective discretion and control of each and every police officer who conducts a search or executes an arrest. Although some critics of the exclusionary rule might welcome such a development, it clearly runs counter to the decisional law of this Court.

The State readily acknowledges that based upon the record that was before the Rhode Island Supreme Court, the burden of establishing probable cause in this case is not an easy one. Of course, as this Court has stated, in demonstrating probable cause, the State's burden is considerably less stringent than proof beyond a reasonable doubt. Rather, the State need establish "only the prob-

ability, and not a prima facie showing, of criminal activity." *Illinois v. Gates*, 103 S. Ct. 2317, 2330 (1983) (citations omitted). Measured in this context, the State respectfully suggests that ample information is present upon this record to support a finding of probable cause.

First, the Warwick police had received a report regarding a shooting. Upon responding to the scene, police officers found a man dead on the floor lying in a pool of blood. The sole (living) occupant of the home was the defendant, whom the police observed to be in a somewhat agitated state. In the presence of police, defendant made a spontaneous and unsolicited statement to the effect that he had supplied the weapon to the deceased. This information clearly supported a conclusion by the officers that the defendant had possessed a firearm[2] and that he had, at least, aided and assisted a suicide.[3] Although this infor-

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[2]R.I. Gen. L. § 11-47-5 prohibits any person previously convicted of a crime of violence from possessing a firearm. In the instant case, defendant was charged with two counts of violating this statute. These counts were severed from the murder charge and remain to be tried. One of the Warwick police officers at the scene of the homicide prior to defendant's arrest testified that he knew of defendant's prior contacts with the police. Knowledge of the defendant's prior convictions would undoubtedly have been within the collective knowledge of the police. Thus, at the time of defendant's transportation to police headquarters, police undoubtedly had probable cause to arrest defendant for violating § 11-47-5.

[3]Defendant's admission that he supplied the weapon to a potential suicide victim would clearly supply probable cause for the common law crime of aiding a suicide:

> It has been ably argued that suicide was murder by the English common law. But whether it is to be regarded as murder, or a separate but similar offense, there is no dispute that suicide, as were explained, was a felony.

(Continued on following page)

mation alone might not constitute proof beyond a reasonable doubt, the State respectfully submits that it rises to the level of "the probability . . . of criminal activity." *Gates, supra.* On such a record, the State submits, the Rhode Island Supreme Court erred in failing to undertake any review for the presence of probable cause. Without such a determination, application of the exclusionary rule by the court can only be described as "indiscriminate." *Stone v. Powell, supra.*

The State respectfully submits that based upon this Court's prior decisions, the Rhode Island Supreme Court was required to make a specific finding on the issue of probable cause prior to invoking the exclusionary rule. The failure to do so constitutes error. This court should grant a writ of certiorari to correct that error.

(Continued from previous page)

Because of this fact an attempt to commit suicide was a misdemeanor. One who encouraged another to commit suicide was guilty of a felony as a principal if he was present at the act which caused the death, and as an accessory before the fact if he was not present when the fatal act was committed.

R. Perkins, *Criminal Law* at 83 (2d Ed. 1969); *see generally* 40 Am. Jur. 2d § 585, at 845-47 (modern jurisdictions differ as to nature of culpability of individual who aids or abets suicide). Although it would not appear that Rhode Island has ever prosecuted for aiding a suicide, the legislature clearly provided that any offense that was criminal at the common law may be punished as a criminal offense under Rhode Island law. R.I. Gen. L. § 11-1-1.

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CONCLUSION

The State submits that the Rhode Island Supreme Court erred in its suppression of the defendant's statements. The court erroneously applied the Sixth Amendment to statements that were made to a private individual and overheard by the police as a result of happenstance. Certiorari should be granted on this issue, because the Rhode Island Supreme Court has decided a federal question "in a way in conflict with applicable decisions of this court," R. 17.1(c). With regard to the Fourth Amendment issues, the Rhode Island Supreme Court suppressed defendant's statements without ever determining that the police had illegally arrested the defendant. This constitutes an erroneous application of the Fourth Amendment exclusionary rule. The State submits that the within petition for certiorari should be granted because the Rhode Island Supreme Court's decision conflicts with applicable decisions of this Court, and because this question "has not been, but should be, settled by this Court . . ." *Id.*

Respectfully submitted,

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

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APPENDIX

June 9, 1986

Supreme Court
No. 85-149-C.A.

State

v.

Stephen R. Mattatall.

OPINION

WEISBERGER, J. This case comes before us on the defendant's appeal from a judgment of conviction of second-degree murder entered after a jury trial. Thereafter, the trial justice denied the defendant's motion for new trial and sentenced him to a term of forty years' imprisonment of which ten-years were suspended. The trial justice further imposed an additional ten year sentence upon the defendant, Stephen R. Mattatall, as a habitual offender. We reverse the conviction. The facts of the case insofar as pertinent to this opinion are as follows.

On the morning of September 24, 1982, defendant's wife found the body of John Scanlon on the kitchen floor of the Mattatalls' Warwick dwelling. Scanlon had apparently been shot in the face. A .22-caliber pistol was visible beneath the body. Doctor Loren J. Mednick, an assistant medical examiner for the state, later found that Scanlon had died between midnight and 4 a.m. on September 24, 1982, by reason of a fatal gunshot wound to the cheek.

At about 9:15 a.m. Sergeant Ernest Pierce of the Warwick police department arrived at the Mattatall home and observed that defendant was extremely agitated. The ser-

geant, admonishing defendant to sit down on the couch, asked him some questions about the .22-caliber gun but received no definitive reply. At this point Lieutenant James J. Goodbout, who was in charge of the investigation, instructed Sergeant Pierce to have Mattatall transported to police headquarters in order to further the investigation as well as to get statements from Mattatall. Lieutenant Godbout testified that Mattatall was not at liberty to refuse his removal to the police station and presumably was not free to depart from the station until the investigative interrogation had been completed. Patrolman Ernest Heon drove defendant to the station in a police cruiser and then led him into an interrogation room within the detective division.

In the interrogation room Detective Johnson admonished defendant of his *Miranda* rights at about 11 a.m. on September 24, 1982. In response to these admonitions, defendant declined to sign a waiver-of-rights form. Detective Johnson continued to question Mattatall, who informed the detective that he and Scanlon had been drinking together, that the .22-caliber gun was not owned by defendant, but that defendant did own a .357-magnum pistol. The defendant suggested that Scanlon had committed suicide. After about fifteen or twenty minutes of interrogation defendant told Detective Johnson that he no longer wished to discuss the matter with him.

Lieutenant Godbout returned to the police station and brought defendant to a larger interview or interrogation room. The lieutenant advised defendant of his *Miranda* rights against at about 12:30 p.m., and Mattatall signed a waiver-of-rights form at that time. Mattatall stated that he and Scanlon had been drinking the night before

and that Scanlon had asked him if he owned a gun. The defendant stated that he gave Scanlon a .22-caliber gun with a single bullet and then went upstairs to bed. Thereafter, when defendant refused to sign a consent form to allow a neutron-absorption test to be administered, a warrant was obtained to perform this test in order to determine whether defendant had recently fired a gun. The test was performed and concluded at about 3 p.m. The results were negative. Thereafter, Lieutenant Godbout continued his interrogation, and Mattatall admitted that he owned a .357 magnum as well as the .22-caliber gun. The defendant refused to tell the police where the magnum was located but signed a consent form allowing the police to search his home for the gun.

At this point, defendant became more and more agitated, began to cry, and then stated that he was showing Scanlon how to work the .22-caliber gun, and that it had accidentally discharged, and struck Scanlon in the face. Lieutenant Godbout then asked defendant why he had not called the rescue squad or the police at that point. Mattatall replied that he had nothing further to say. At this point questioning was terminated, and defendant was allowed to call his attorney. Statements taken during the course of this interrogation were introduced into evidence during the trial after a motion to suppress was denied. During the suppression hearing the prosecution took the position that since Mattatall was not under arrest when he was taken to the station and was not a suspect at that time, it was unnecessary to establish probable cause in order to justify his transportation to police headquarters and his seizure or custody for investigative purposes. The trial justice agreed that Mattatall was not arrested. No

ruling was requested or made on the issue of probable cause for the detention.

Certain statements made by defendant to one John Carney after Mattatall had been arraigned and after counsel had entered an appearance on behalf of defendant also were admitted during the course of the trial. More details concerning these statements will be set forth later in this opinion. It is sufficient at this point to indicate that the conversations between defendant and Carney were overheard by the police with Carney's consent.

In support of his appeal defendant raises seven issues, only two of which will be dealt with in this opinion. Further facts will be supplied as necessary in dealing with these issues.

I

For purposes of this opinion, the court must assume that at the time Mattatall was ordered to be transported to Warwick police headquarters, the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide, or indeed that a homicide had been committed. Their purpose in transporting Mattatall to the police station was investigative only. They did not suspect him of homicide or murder. Such suspicion arose later because of defendant's responses to interrogation, together with the finding of a .357 magnum in a stream near Mattatall's house and certain ballistic findings concerning the fact that the gunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had

no probable cause to believe that he was guilty of a crime. The purpose of this removal was investigative and was not considered by the police to be a full custodial arrest. The arrest took place later at the police station after Mattatall made certain statements that he might have intended to be exculpatory but which led the police to believe that he was involved in a homicide. We shall also assume for the purpose of this opinion that defendant was properly admonished of his *Miranda* rights and that his responses to interrogation were voluntary as found by the trial justice.

The Supreme Court of the United States has unequivocally held in a series of opinions that the fruits of an illegal seizure or detention are inadmissible in evidence, whether obtained by interrogation or otherwise. *Taylor v. Alabama,* 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982); *Dunaway v. New York,* 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *Brown v. Illinois,* 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *Davis v. Mississippi,* 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969); *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The foregoing cases establish the principle that if a person is detained in violation of the rights guaranteed by the Fourth Amendment to the Constitution of the United States, any fruits of the illegal detention are inadmissible even if they are oral statements, as in *Taylor, Dunaway* and *Brown,* for which adequate *Miranda* warnings had been given for Fifth Amendment purposes. It was also established in *Davis v. Mississippi,* as well as in *Taylor v. Alabama,* that the taking of fingerprints during

such an illegal detention will result in the exclusion of these prints from evidence.

The state argues that since Mattatall was not under full custodial arrest, his statements, if given voluntarily, should be admissible. This argument was presented in *Dunaway v. New York, supra,* and was rejected. In that case the Court observed, after contrasting such investigative detention from the brief investigative stop approved in *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), as follows:

> "[T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes * * * obviously do not make petitioners seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* [*v. Ohio,* 392 U.S. 1 (1968)] and its progeny. Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway,* 442 U.S. at 212-13, 99 S. Ct. at 2256-57, 60 L. Ed. 2d at 835-36.

The Court, in *Dunaway,* rejected the same distinction between investigation and accusation that it had rejected

ten years earlier in *Davis v. Mississippi, supra.* In *Davis,* a young man, along with forty or fifty other black youths, was detained at a police station incident to a rape investigation, was fingerprinted, and was then released. No probable cause was established for the seizure and detention of Davis. The state argued that Davis was not arrested but only detained briefly for investigative purposes with a minimum intrusion during the course of fingerprinting. The Court responded with this statement:

> "[T]o argue that the Fourth Amendment does not apply to the investigatory stage if fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis,* 394 U.S. at 726-27, 89 S. Ct. at 1397, 22 L. Ed. 2d at 680-81.

There seems no question that in the case at bar defendant was seized for Fourth Amendment purposes and was detained for a substantial period of time during which he was interrogated. There is no question that the fruits of this interrogation assisted in the establishment of probable cause for his arrest and were used against him at the trial in order to obtain his conviction.

This court has had occasion to consider such detention in *State v. Bailey,* 417 A.2d 915 (R.I. 1980). In that case, we established the criteria for determining whether an arrest or seizure has taken place for Fourth Amendment purposes. These factors included: "[1] the extent

to which the person's freedom of movement has been curtailed and the degree of force used by the police * * * [2] the belief of a reasonable innocent person [concerning his/her inhibition of movement] in the same circumstances * * * and [3] [the question of] whether the person had the option of not going with the police * * *." *Id.* at 917-18. Applying these factors to the instant case, one is compelled to conclude that Mattatall's freedom of movement was curtailed, certainly from the moment that Lieutenant Godbout ordered that he be transported to the police station. Mattatall did not have the option of declining to go with the police. Moreover, the fact that there were a number of police officers at the scene would have caused a reasonable person to conclude that he was subject to official restrains. Although the police did not use physical force upon defendant and did not handcuff him, they did act under color of authority and under circumstances that would cause a reasonable person to conclude that refusal to accompany them would be ineffective.

Taking into account the relevant authorities cited above, we are of the opinion that the oral statements made by defendant during the course of his detention at the Warwick police station were the fruits of an illegal seizure in violation of the Fourth Amendment to the Constitution of the United States, and therefore, were inadmissible in evidence against him. The trial justice erred in admitting such statements on the ground that he found them to be voluntary for Fifth Amendment purposes.

II

The defendant further contends that the admission into evidence of statements that he made to John Carney

over the telephone were inadmissible as violative of his Sixth Amendment right to counsel pursuant to principles enunciated in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and reaffirmed in *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), and *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), and most recently in *Maine v. Moulton*, — U.S. —, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). The facts relating to the Carney telephone conversations may be briefly stated.

Carney testified that he had asked members of the Warwick police to come to his home because of threatening telephone calls that he had received from Mattatall. While the police were present at Carney's home on December 26 and 27, 1983, calls came in from Mattatall. At Carney's invitation, members of the Warwick police department listened to these conversations and heard Mattatall state to Carney that the victim's death was accidential and not suicidal and that Mattatall might have been involved in the accidential death. These statements were used against defendant at the trial. The parties stipulated that prior to these dates defendant had been arraigned on the charge of homicide and that counsel had appeared to represent him. Evidence indicates that the police officers who listened in on the conversations were aware of the pending homicide charges against Mattatall.

The state argues that this case is distinguishable from *Massiah* and *Henry* because in those cases federal officers had arranged for a person to listen to admissions made by a defendant who had been charged with a crime and for whom counsel had entered an appearance. The sur-

reptitious "eavesdropping" had occurred under circumstances in which the officers had reason to believe that the listening individuals (a friend whose car was wired for sound in *Massiah* and a "sympathetic" fellow prisoner who listened in *Henry*) would elicit incriminating statements from the accused. Here the state argues that the officers were motivated to investigate a separate crime, that of threatening phone calls, not to obtain information concerning the pending charge. The state further contends that the police officers did not instigate the phone calls but only listened to calls initiated by Mattatall himself.

This case is very similar to *Maine v. Moulton, supra.* In that case police had learned from a codefendant turned informant that he suspected that he had received threatening telephone calls from an anonymous source concerning his pending charges. He also stated that Moulton had suggested the killing of a prosecution witness. The police then wired the codefendant for sound, with his consent, and recorded conversations between the codefendant and Moulton. During the course of these conversations, Moulton made a number of incriminating statements concerning the pending charges. These statements were admitted against him at trial. Both the Supreme Judicial Court of Maine and the Supreme Court of the United States held that these statements were improperly admitted.

The Supreme Court of the United States, in passing upon the prosecution's argument that there was a duty and an appropriate interest in investigating new or additional crimes, made the following comment:

> "The police have an interest in the thorough investigation of crimes for which formal charges have al-

> ready been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. * * * In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. * * * Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." — U.S. at —, 106 S.Ct. at 489-90, 88 L. Ed. 2d at 498-99.

The fact that Mattatall had not been indicted in this case is of no consequence since the Sixth Amendment right to counsel applies as soon as adversial judicial proceedings have commenced. *Brewer v. Williams, supra; Kirby v. Illinois,* 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). There is no question that the Sixth Amendment right to counsel was applicable in this case, that counsel had entered an appearance in the case, that the police knew or were chargeable with knowledge of this set of facts, and that they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. However justifiable it may have been for the police to take this action for the purpose of investigating other criminal conduct, the plain message of *Moulton* is

that the prosecution may not use evidence obtained regarding the pending charges against the defendant at his trial. Whether the police use a telephone, an electronic device, or a jailmate to obtain this information is not controlling. The doctrine established by the Supreme Court of the United States requires that such information not be used in evidence against the defendant on the charge in respect to which the right to counsel has previously attached. Therefore, testimony concerning the statements made to Carney should not have been admitted into evidence.

Because of the conclusions that we have reached in regard to the issues previously discussed in this opinion, it is unnecessary for us to discuss and analyze the additional five issues that have been raised by the defendant. Obviously, since the conviction of the defendant on the murder charge is to be vacated, the consecutive sentence imposed as a habitual offender must be vacated as well. The other issues raised do not require discussion at this time since they will not necessarily be presented in the same fashion at a subsequent trial.

For the reasons stated, the defendant's conviction is hereby vacated and the papers in the case are remanded to the Superior Court for a new trial.

Chief Justice Bevilacqua did not participate.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

NO. 85-149-C.A.

STATE OF RHODE ISLAND

V.

STEPHEN R. MATTATALL

STATE'S PETITION FOR REARGUMENT (R. 25)

Now comes the State, pursuant to Rule 25, and petitions for reargument of this Court's June 9, 1986, decision in the above-captioned case. In support hereof the state says:

1. With regard to the first issue, the Court has failed to address the fundamental question whether the police had probable cause to arrest the defendant. The Court assumed, without deciding, that the police lacked probable cause. The State claims that the police had probable cause. Assuming arguendo that the record as developed fails to demonstrate probable cause, the proper remedy would be a remand to permit the trial court to make proper factual findings on this issue;

2. Regarding the second issue, the State submits that the Court has erroneously applied the decision of the United States Supreme Court in *Maine v. Moulton,* 106 S. Ct. 477 (1985);

3. Also with regard to the second issue, the court has erred in suppressing the testimony of the witness Carney. At most, the only properly suppressable testimony would

be that of the police officers who overheard the conversations;

4. The State's contentions are set forth more fully in an accompanying memorandum.

Respectfully submitted,

STATE OF RHODE ISLAND

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ATTORNEY GENERAL

/s/ Thomas M. Dickinson
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CERTIFICATION

I, hereby certify that on this 13th day of June, 1986, I delivered a true and accurate copy of the enclosed State's Petition for Reargument to the attorney of record, Janice Weisfeld, Esquire, Assistant Public Defender, Office of the Public Defender, 250 Benefit Street, Providence, Rhode Island 02903.

/s/ Geraldine A. Nanni

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

NO. 85-149-C.A.

STATE OF RHODE ISLAND

v.

STEPHEN R. MATTATALL

STATE'S MEMORANDUM IN SUPPORT OF PETITION FOR REARGUMENT

Introduction

The State respectfully submits that the court's opinion fails to address significant issues that were properly presented. First, the State suggests that this court has erred in failing to consider facts and circumstances that demonstrate the existence of probable cause for arrest. Furthermore, the State submits, this court has erred in the application of *Maine v. Moulton,* 88 L.Ed.2d 481 (1985) to the instant case. For these reasons the State respectfully prays for reargument.

I. *This Court Erroneously Assumed Police Lacked Probable Cause.*

In concluding that the trial justice incorrectly admitted the defendant's statements, this court assumed that "the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide . . ." Slip op. at 4-5. The State respectfully suggests that it is not appropriate for this Court to make such an assumption. The State readily acknowledges that

no probable cause determination was made by the trial justice.[1]

On such a record, this court normally undertakes the task of reviewing the record to determine whether probable cause exists to support the arrest. *State v. Hughes*, 494 A.2d 85 *cert denied*, 106 S.Ct. 536 (1985); *State v. Adams*, 481 A.2d 718 (1984). Such an analysis is necessary because "the determination of the legality of the arrest is an essential predicate for the admission of any evidence that might be the fruit of such an arrest." *State v. Hughes*, 494 A.2d at 88. In the instant case the record clearly established information that could constitute probable cause for arrest. First, the police had received a report regarding a shooting. Upon responding to the scene, police officers found a man dead on the floor lying in a pool of blood. The sole (living) occupant of the home was the defendant. In the presence of police, defendant made a spontaneous and unsolicited statement to the effect that he had supplied the weapon to the deceased. The following testimony by Sergeant Ernest Pierce clearly establishes these facts:

> Q. During the approximate one hour period that you have indicated you were in that home, did you have occasion to see any, what we call a civilian? Anyone who was a non-Warwick Police Department?

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[1] Assuming arguendo that the police did not know that they had probable cause for arrest, this alone would not warrant the court's assumption. Probable cause is an objective concept. The presence or absence of probable cause cannot depend upon the officer's subjective belief that he possessed probable cause. If it did, the exclusionary rule and the Fourth Amendment would have little force. Suppression could be avoided on the basis of the officer's belief—whether right or wrong—that probable cause existed.

A. There was the deceased person on the floor in the kitchen area, and then eventually a man came down from upstairs.

Q. And did that man identify himself?

A. Yes, sir.

Q. And how did he identify himself?

A. Well, he said he was the owner of the property, and his name was Stephen Mattatall.

Q. If you were to see that individual again, would you recognize him, Sergeant?

A. Yes, sir.

Q. Would you look around the courtroom? Do you see him here?

A. Yes, sitting there; brown coat.

MR. CHASE: Your Honor, may the record reflect the sergeant has identified the defendant?

MR. DiLAURO: No objection.

THE COURT: It may so reflect.

MR. CHASE: Thank you.

Q. Now, when you first saw the defendant, what was he doing?

A. He came downstairs. He was walking around the living room area.

Q. Was he displaying any emotion?

A. He was very agitated, nervous.

Q. And what did you do once you saw this, if anything?

A. I asked him to sit down. He was carrying his boots in his hand. He was walking around, and I asked him why didn't he sit down and put his boots on.

Q. And did he?

A. He did.

Q. And where were you at this time?

A. I was in the living room area with him.

Q. Did you remain standing?

A. No, I sat down on the couch with him.

Q. Now, had you been told at that point that he was going to be charged with any crime?

A. No.

Q. Were you told that he was a suspect in the crime?

A. No.

Q. What did you know him to be at the point that you sat on the couch next to him?

A. Owner of the property.

Q. Did you initiate any type of questioning of him at that particular point?

A. No.

Q. Did he say anything to you?

A. Yes.

Q. And what did he say at that time?

A. He looked at the deceased and stated that he should not have shown him the gun last night.

Q. Was this remark that he made in response to any question?

A. I asked him no questions.

Q. He just offered it?

A. Yes, sir.

Q. Did you then say anything to him when he said this?

A. Well, I asked him if that was his gun.

Q. And were you pointing to anything?

A. It was visible underneath the body of the man.

Q. Okay, did he respond to you?

A. He said he had no more to say about the gun.

MR. CHASE: No further questions, Your Honor. Detective Godbout, who was also present at the scene, testified that he had knowledge of the defendant with regard to other investigations. (Tr. 96)

The State respectfully suggests that at the moment when defendant was transported to the station, the police had adequate probable cause to support his arrest. In *In re John*, 425 A.2d 536 (1981) cert. denied, 453 U.S. 922, this court described probable cause as follows:

> [I]t exists when, at the moment of arrest, the facts and circumstances within the police officers' knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent person's believing that the prospective arrestee had committed or was committing an offense. As the term "probable cause" implies, the concept deals with probabilities, not with certainty; probable cause may exist even though the evidence before the arresting officer may not be sufficient to establish guilt.

425 A.2d at 538. In *John* this court aptly described probable cause as a "mosaic." The mosaic in the instant case involved several pieces of information. The police knew that a man had been shot to death in defendant's home. They also knew that defendant was the only person at the scene, that he was extremely agitated, that he admitted that the fatal bullet was shot from his own gun. Defendant further stated that he had supplied the gun to the victim.

Police clearly had probable cause to believe that defendant had possessed a firearm[2] and that he had, at least, aided and assisted a suicide.[3]

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[2] Gen. L. Sec. 11-47-5 prohibits any person previously convicted of a crime of violence from possessing a firearm. In the instant indictment, defendant was charged with two counts of violating this statute. These counts were severed from the murder count for trial. Detective Godbout testified that he knew of defendant's past contacts with the police. Knowledge of defendant's prior convictions would undoubtedly have been within the collective consciousness of the police as provided in *State v. Roberts*, 434 A.2d 257, 262 (R.I. 1981). Thus, at the time of defendant's transportation to headquarters, police unquestionably had probable cause to arrest him for violating § 11-47-5.

[3] Defendant's admission that he supplied the weapon to a potential suicide victim would clearly supply probable cause for the common law crime of aiding a suicide:

> "It has been ably argued that suicide was murder by the English common law. But whether it is to be regarded as murder, or as a separate but similar offense, there is no dispute that suicide, as were explained, was a felony. Because of this fact an attempt to commit suicide was a misdemeanor. One who encouraged another to commit suicide was guilty of a felony as a principal if he was present at the act which caused the death, and as an accessory before the fact if he was not present when the fatal act was committed."

R. Perkins, *Criminal Law* at 83 (2d ed. 1969); *see generally* 40 Am Jur. 2d § 585, at 845-47 (modern jurisdictions differ as to nature of culpability of individual who aids or abets suicide).

The General Assembly provided, in R.I.G.L. § 11-1-1, as follows:

> Every act or omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at common law . . .

Although it would not appear that Rhode Island has ever prosecuted for this crime, it can scarcely be argued that this fact would have any impact on the objective issue of probable cause.

The State respectfully submits that this information was sufficient to justify defendant's arrest. Even if the instant record fails to support probable cause, however, the State suggests that the proper remedy is not reversal. Instead, the matter should be remanded to the trial justice to permit him to make a determination based on a hearing directed to the issue of probable cause.

This court, in granting defendant's appeal, has completely overlooked the information that was in the collective police knowledge. The State therefore requests reargument in order that adequate consideration can be given to this information.

II. *The Court Has Erroneously Applied the Rule of Maine v. Moulton.*

This court has held that statements made by defendant to John Carney could not be admitted into evidence. The court concluded that admission of these statements was violative of the defendant's Sixth Amendment right to counsel. In reaching this conclusion, this court relied upon *Maine v. Moulton,* 88 L.Ed.2d 481 (1985). The State submits that this court's conclusion is contrary to the reasoning of *Moulton.* The *Moulton* case involved a situation where a government agent, who was also the defendant's co-defendant, engaged in a series of conversations with the defendant. The defendant made numerous admissions to the agent, which admissions were tape recorded and utilized for the prosecution at trial. The Supreme Court found this process to be violative of the defendant's Sixth Amendment right to counsel. In reaching this result, the court employed the following reasoning:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by State agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached . . . However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as the intentional creation of such an opportunity.

Id. at 496. (citations omitted) In footnote 12, the Court suggests that the defendant must demonstrate that "the State 'must have known' that its *agent* was likely to obtain incriminating statements from the accused . . ." *Id.* n. 12 (emphasis added).

In the instant case, the trial justice made the following factual findings:

> [The Court] Mr. Carney testified, it was uncontradicted, that he had called the police to his home for protection. That's what the police were there for because of the threats Mr. Carney allegedly had received. While they were there, the phone rang. Mr. Carney answered and asked the police officer to listen in.
>
> This defendant had no right to privacy in a telephone call when he makes it outside. This telephone call was made to Mr. Carney. There is no evidence on the record that there is any suggestion by the police as to what Mr. Carney should say, or how he should direct the conversation, or that he should raise the

issue of the Scanlon shooting. There was nothing at all. The police role was entirely passive. They listened. They gave no instructions.

Mr. Carney stated clearly that he was not acting for the police. He had the police in the house for purposes of protection. (Tr. 277-78)

In the instant case, there was absolutely no evidence that Carney was an "agent" of the police. The trial justice specifically found that the police were mere passive players in the scene. Carney was neither an agent nor an operative. The defendants calls to Carney were totally unrelated to the presence of the police at the scene. Had there been no police presence, defendant's statements to Carney would undoubtedly be admissible. Thus, this was clearly a situation of "luck or happenstance" as anticipated in *Moulton*. On such a record, there is simply no Sixth Amendment violation.

The State suggests that reargument is necessary in order for the court to address the "luck or happenstance" aspect of *Moulton*.

CONCLUSION

For the foregoing reasons the State respectfully prays that the petition to reargue be granted.

Respectfully submitted,

STATE OF RHODE ISLAND

ARLENE VIOLET
ATTORNEY GENERAL

/s/ Thomas M. Dickinson
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CERTIFICATION

I, hereby certify that on this 13th day of June, 1986, I delivered a true and accurate copy of the enclosed State's Petition for Reargument to the attorney of record, Janice Weisfeld, Esquire, Assistant Public Defender, Office of the Public Defender, 250 Benefit Street, Providence, Rhode Island 02903.

/s/ Geraldine A. Nanni

Supreme Court

No. 85-149-C.A.

State

v.

Stephen R. Mattatall

ORDER

The petition for reargument is denied.

Entered as an Order of this Court this 26th day of June, 1986.

By Order,

/s/ Brian B. Burns
Walter J. Kane, Clerk

1. United States Constitution, amend. IV, reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. United States Constitution, amend. XIV, sec. 1, reads in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. United States Constitution, amend. VI, reads:

Rights of the accused in criminal prosecutions.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. R.I. Gen. Laws § 11-1-1, reads:

11.1-1. *Common law offenses not covered by statute.*—Every act and omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at com-

mon law. Every person who shall be convicted of any such offense which is a misdemeanor at common law shall be imprisoned for a term not exceeding one (1) year or be fined not exceeding five hundred dollars ($500). Every person who shall be convicted of any such offense which is a felony at common law shall be imprisoned for a term not exceeding five (5) years or be fined not exceeding five thousand dollars ($5,000).

5. R.I. Gen. Laws § 11-47-5, reads:

11-47-5. *Criminals and fugitives prohibited from possession.*— No person who has been convicted in this state or elsewhere of a crime of violence or who is a fugitive from justice shall purchase, own, carry, transport or have in his possession or under his control any firearm. Every person violating the provisions of this section shall upon conviction, be punished by imprisonment for not less than two (2) nor more than ten (10) years; and for penalties provided in this section he shall not be afforded the benefit of suspension or deferment of sentence nor of probation.